



Neutral Citation Number: [2023] EWHC 3300 (Admin)

Case No.: CO/1415/2023; AC-2023-LON-001225

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

**As amended under the slip rule pursuant to CPR 40.12(1)  
on 8<sup>th</sup> February 2024 by Mr Justice Ritchie**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20<sup>th</sup> December 2023

**Before :**

**Mr Justice Ritchie**

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**Between :**

**The KING**

**Claimant**

**(On the application of EILEEN DUNNE (1)  
FRANCIS DUNNE BY HIS LITIGATION  
FRIEND EILEEN DUNNE (2))**

**- and -**

**THE INDEPENDENT OFFICE FOR POLICE  
CONDUCT**

**Defendant**

**- and -**

**POLICE OFFICER TP7**

**Interested Party**

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**Adam Straw KC and Jesse Nicholls (instructed by Deighton Pierce Glynn) for the Claimants**  
**Dijen Basu KC (instructed by in house solicitors) for the Defendant**  
**Nicholas Yeo for the Interested Party**

Hearing dates: 6<sup>th</sup> December 2023  
Slip rule hearing date: 8<sup>th</sup> February 2024

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**Approved Judgment**

## **Mr Justice Ritchie:**

### **The Parties**

1. The 2<sup>nd</sup> Claimant is a member of the public who before the relevant events was reasonably fit and healthy. The 1<sup>st</sup> Claimant is his mother.
2. The Defendant is the independent body set up to investigate and make recommendations upon police conduct.
3. The Interested Party is a serving police officer with the Metropolitan police [the Police].

### **Bundles**

4. For the hearing the Court was provided with digital bundles: a core bundle, a supplementary bundle, an authorities bundle and skeleton arguments and submissions on effective participation after the end of the hearing.

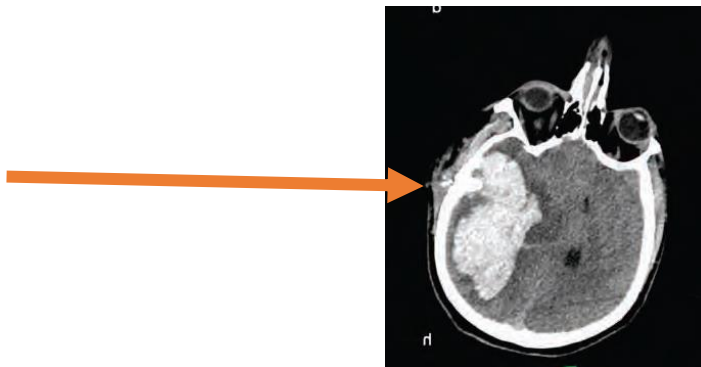
### **Abbreviations or Acronyms**

5. ASFG: Amended Statement of Facts and Grounds.  
MoP: Member of the Public.  
AFO: Authorised Firearms Officer.  
FD: The 2<sup>nd</sup> Claimant.  
GW5: An AFO.  
TP7: An AFO and an Interested Party.  
KD33: The Tactical Firearms Commander.  
Art. 2/3: Articles 2 and 3 of the European Convention on Human Rights.  
ECHR: The European Convention on Human Rights.  
Intel: Intelligence gathered by the Police force or received by them.  
BWV: Body worn video.  
IOPC: The Defendant.

### **The Facts**

6. I extract these facts from the statements of facts and documents put before the Court. I am not making findings of fact here in the traditional sense because I have not seen the evidence which the Defendant gathered, only part of it and it is not the purpose of this Court, on judicial review, to establish and decide the primary facts.
7. On 10 May 2021 the Police had Intel that FD, in the last month, had possession of a gun or guns and an axe. He was on licence from prison and this had been allegedly breached so he was on “recall”. He was wanted for aggravated burglary and making threats to kill. His blue BMW car had various different number plates which he used. He was approached by armed AFOs at 20.55 hours and told to stand still, then to lie on the ground. He did not comply. He ran into a nearby house and then into the kitchen. He was followed by not less than 3 officers who were shouting at him to lie down and

were carrying semi-automatic carbines/rifles. He did not lie down but instead resisted. In the kitchen, whilst FD was holding off or holding the muzzle of the semi-automatic carbine of another officer, GW5, with his left hand and whilst his right hand was probably (this is in issue) not visible, being behind his body, he was being repeatedly told to lie down but he refused. At 20.56 hours FD suffered life-threatening injuries as a result of the use of potentially lethal force (I use those words intentionally) by TP7 who forcefully struck FD on the left temporal region of his head with the end of the metal muzzle of his semi-automatic carbine. FD fell to the ground. The metal had penetrated FD's brain. This penetration caused a comminuted, open, left temporal fracture and a large underlying intracerebral haematoma (bleed inside the brain). FD got up, pushed past the AFOs and ran out of the house but was caught and brought down or fell down and then, over time, fell into unconsciousness. An ambulance was called at 21.05 hours and arrived at the scene at 21.37 hours. Around 30 minutes later it departed. When FD was at hospital a brain scan was performed. Here is one of the pictures from the scan (showing in white) the large left sided brain bleed:



Mr Jassar, a surgeon, noted that brain tissue was being exuded from FD's head wound at the time of surgery (a sign of high intracranial pressure). He underwent a decompressive craniectomy and clot evacuation which was completed just after 02.00 hours on 11.5.2021. The Claimants assert that FD has suffered severe brain damage resulting in severe physical, sensory, cognitive, communication and behavioural impairments. He is unable to communicate or move independently, save for a limited ability to move parts of the right side of this body. He does not have capacity to bring this claim.

8. Police searches of FD, his car and the house disclosed no guns or axes.
9. The Defendant investigated the conduct of the police officers because the Police self-referred and because complaints were made by the First Claimant on 11.8.2021 inter alia about the planning, tactics and actions of the Police, the delays in obtaining medical care and alleged discrimination because FD is from the Traveller community. After carrying out an investigation and drafting a report, the Defendant, through Colin Dewar, wrote to the 1<sup>st</sup> Claimant on 10.2.2023 setting out its final decision:

- (a) that there was no indication that a disciplinary or criminal offence had been committed;
  - (b) that the Defendant would not refer the matter to the Crown Prosecution Service (“CPS”) in respect of a prosecution;
  - (c) that there would be no disciplinary proceedings against any of the officers; and
  - (d) that all the First Claimant’s complaints were rejected (the “Decision”).
10. The Claimants were provided with none of the evidence gathered before the final report was completed.
11. Relevant extracts from the final report are summarised below. JM was the lead investigator who, at para. 3, stated: *“I will provide an accurate summary of the evidence ... sufficient to enable the decisions maker to determine whether to refer any matter to the CPS...”* or to form *“a provisional opinion on ...”* misconduct or no case to answer, whether disciplinary proceedings should be brought etc. or referral under the Reflective Practice Review Process. The purpose was to investigate the circumstances surrounding FD’s arrest and specifically: the intelligence and planning; whether the force used was reasonable, necessary and proportionate; aftercare; whether there was less favourable treatment because FD was a member of the Traveller community and the Claimants’ other complaints.
12. JM summarised the law relating to the use of force by the Police and focussed on the use of weapons to strike MoPs. JM wrote that a strike may be used to prevent an attack or to achieve control; that a strike should primarily be delivered to a major muscle group; in relation to firearms and strikes using them, JM summarised that whilst not designed for body strikes, firearms may be used for such purposes to block or strike a MoP depending on the circumstances. The muzzle may be used for a strike if necessary and justifiable in the circumstances. Dropping a weapon, such as a rifle, to enable empty hand actions may be impractical in the circumstances, due to delay. JM wrote that AFOs using a rifle muzzle to strike must assess the immediacy and proximity of the threat and make an operational decision on whether it is absolutely necessary to discharge the firearm or take other decisive action. The assessment involves observation, perception, understanding of the wider operation and information or Intel and of course authorisation.
13. JM summarised that there is a hierarchy for authority in firearms use: the Strategic Firearms Commander, the Tactical Firearms Commander and the Tactical Advisor. This team develop a deployment with a strategy and threat assessment and arrange medical support. The National Decision Model is used to assist.
14. JM advised that para. 19A of Sched. 3 of the Police Reform Act 2002 [PRA] did not apply because *“there was no indication that a person to whose conduct the investigation relates may have committed a criminal offence or behaved in a manner which would*

*justify the bringing of disciplinary proceedings.*” That is one of the core issues in this claim.

15. In the summary of the evidence JM reported that a MoP called the Police to report that a blue BMW car in Edgware had displayed different number plates day by day. One was FD63CVV, these were the initials of FD and the police Intel tied him with guns, previous videos from April showing him with a gun, making threats to kill, and that FD was wanted for 3 offences and recall to prison. The Ambulance service was asked to stand by. KD33 declared an incident and stated on the radio that FD had sent a social media picture 2 days earlier showing himself with a small hand axe and that Intel included that he kept “Glocks” (this is the name of a gun manufacturer). Automatic number plate recognition picked up the BMW in the early evening. Later the “call out” was stood down, as was the ambulance. At 20.31 pm a police officer spotted the car and reported in. At 20.48 pm KD33 re-declared the incident and advised on a pedestrian interception by 3 AFOs who were on patrol. At 20.52 TP7 was on foot and saw the BMW with two men and one woman around it. He reported it was likely to be FD wearing a coat and fur hood and jogging bottoms. TP7 and other AFOs advanced, some from vehicles. They demanded that the 3 persons stay where they were. They had their guns raised. FD did not obey. He was not wearing a coat or hood. He ran across the grass into a house. GW5 was the first AFO following FD into the house and they ran down the hallway and into the kitchen, followed closely by TP7. The AFOs shouted “*stay still*”. FD did not. They shouted “*get on the fucking floor*”, FD did not. When TP7 entered the kitchen his BWV showed FD was standing by the back door of the kitchen sideways on. I should say here that, having watched the BWV disclosed to the Claimants frame by frame, there are intentionally applied video manipulation “soft focus circles” around the head of GW5 which make the BWV far less helpful because they block large parts of the BWV view of TP7. Any assessor of evidence would need to see the BWV without these to get a proper understanding of what they show.
16. JM wrote that GW5 did a muzzle strike on FD’s left shoulder. He again instructed FD to lie down. FD did not. TP7 was standing to the right of GW5 and raised the firearm he held in his two hands and struck FD on the left temple of his head with the muzzle. FD bent down and slumped. Blood was visible from his head. Soon, FD stood up quickly and pushed past the AFOs via the hallway to the front door, a taser discharged but did nothing. Various body blows were delivered to FD but he moved through the hallway and into the front area outside the house and out onto the road. Then he went down. TC18 grappled him onto the ground. He was arrested. He was still conscious at that time.
17. The Intel is partially footnoted by JM but included reports of FD being involved in an aggravated burglary with another person with a machete and an axe and a MoP reporting receiving threats to kill from FD. In the main report text JM noted a video posted by FD making threats to hurt a MoP and with a firearm in April 2021 in his car.

Before the arrest, the Tactical team had warned the AFOs that FD “*could be*” in possession of a firearm.

18. TP7 wrote in one of his witness statements that he was told FD “*was*” in possession of a firearm. When he saw the three adults come out of the house “*I believed there was a likelihood that the males may have armed themselves.*” When the AFOs approached FD they said “*show me your hands*” but FD ran off. When TP7 entered the kitchen FD tried to get out of the back door, but failed. GW5 made a body strike to FD who “*continued to fight*”. His left arm was in the air and he was either trying to grab GW5’s gun or block him from using it. FD’s right hand was by his waistband out of eyeline. TP7 “*believed FD was in possession of a firearm ...*”, was dangerous and “*reaching for his firearm concealed on him. I was scared for my life.*” He wrote that the muzzle strike was taught to him as a last-ditch manoeuvre to prevent him shooting instead. He wrote that “*due to the immediate threat to life*” he did the muzzle thrust to the head.
19. The Defendant obtained an expert report from Inspector Flack of the Firearms Training Wing of the City of London Police. He carried out no analysis of the credibility of the Intel but opined that KD33’s planning and tactical actions were appropriate. He left a question mark over the lack of tactical advice given by KD33 about entering a house for the arrest. In relation to using the muzzle to strike the head of FD he advised:

“There is nothing in training that precludes strikes to the head, but these represents a significant use of force, and must be justifiable in the circumstances taking due account of the medical implications.”  
[sic].

He also advised that:

“37. From the initial point of contact with Police, until such time as Mr Dunne is secured and handcuffed, he appears to be non-compliant and actively attempting to evade or resist police action. The belief that he had a handgun in his possession is a significant impact factor, in terms of an officer’s threat assessment, as a handgun is generally a small, concealable weapon which may be quickly accessible from clothing.”

### **The Issues**

20. At the start of the hearing the matters set out below were the issues for the Court.

#### **Academic**

21. In the light the Defendant’s U-turn set out below is the claim now academic?
22. **Ground 1:** Whether the Defendant’s investigation and Decision were unlawful, in breach of the procedural duties in Articles 2 and/or 3 of the ECHR and hence contrary to s.6 of the Human Rights Act 1998, because:

#### **Effective Participation - Disclosure**

- a. The Defendant's investigation did not enable FD's family or representative effectively to participate because they were not given enough of the underlying evidence to enable them to do so.

**Public Scrutiny – Full report**

- b. The Defendant failed to ensure a sufficient element of public scrutiny of the investigation and its report, insofar as not already conceded by the Defendant.

**Inadequacy of the investigation**

- c. The Defendant's investigation was not adequate because the Defendant failed thoroughly and effectively to investigate the circumstances of the incident, and to examine or draw conclusions about critical issues, concerning both whether the force was justified, and the planning and control of the operation that led to FD's life-threatening injuries, for the reasons which the Defendant had not conceded, taken together with those which the Defendant had conceded.

23. **Ground 2:** Whether the Defendant's investigation and Decision were unlawful under common law because:
  - a. The Defendant failed to have regard to relevant considerations for the reasons set out above.
  - b. The Decision was unreasonable, in that there was a demonstrable flaw in the reasoning which led to the Decision.

This common law ground adds nothing so I will not mention it again. Both parties agreed this approach.

24. **Relief:** The appropriate relief for the unlawfulness identified above (if found by the Court).
25. **Concessions:** These were the remaining issues because on 6<sup>th</sup> October 2023 the Defendant agreed to the quashing of its report and the Decisions and to an "appropriate" declaration that the Defendant was in breach of the Article 3 of the ECHR investigative duty. I shall explain this in more detail below.
26. Midway though the hearing the Defendant conceded that it would publish its full report (not a summary, which had been its earlier position) after the new investigation (subject to the omission of irrelevant matters) but not that it should. So, the issues narrowed somewhat.

**The Statements of Facts and Grounds**

27. The claim form was issued on 30.5.2023. There were various interlocutory skirmishes which I shall ignore. The Claimants sought the following remedies:
  - (1) A declaration that the Defendant breached its Arts. 2/3 duties in the way it carried out the investigation.
  - (2) An order quashing the Defendant's decisions reached on 10.2.2023 and the Defendant's final report.

- (3) An order requiring the Defendant to re-open the investigation into FD's treatment by the Police by a different investigator.
  - (4) Such other relief as the Court thinks fit.
  - (5) Costs.
28. The Claimants submitted that the Defendant's investigation and Decision were unlawful, for the following reasons.

29. **Ground 1:** the Defendant breached the procedural duties in Arts. 2/3 of the European Convention on Human Rights ("ECHR") because:

**Inadequate Investigation**

- a. The Defendant failed thoroughly and effectively to investigate the circumstances of the incident, to examine or draw conclusions about critical issues concerning both whether the planning and control of the operation that led to FD's life-threatening injuries was sufficient or the force used by TP7 was justified. The key complaints were that the Defendant did not interview the officers and the analysis was inadequate. The quality of the intelligence about FD having a gun and making threats to kill was not properly analysed.

**Effective Participation**

- b. The Defendant did not enable FD's family or representative, the First Claimant, effectively to participate in its investigation. The Claimants' primary complaint is that the Defendant failed to disclose the critical evidence in the case, the Body Worn Video footage which, in the circumstances, meant that the Claimants were unable to make effective submissions on the key issues. A supplementary complaint is that the Defendant did not disclose any other evidence or the draft report for the Claimants' comments and submissions before the final report.

**Public Scrutiny**

- c. The Defendant failed to ensure a sufficient element of public scrutiny of the investigation and its report. The Defendant published a one-page, anonymised, general summary which was insufficient. A greater level of public scrutiny is required, in particular the publication of the Defendant's full report.

As a result, the Claimants assert that the Defendant acted unlawfully under s.6 of the *Human Rights Act 1998* due to breaches of Articles 2 and 3 of the ECHR [Arts. 2/3].

30. In the Statement of Grounds the Claimants set out various submissions which they would have made to the Defendant during the investigation had they been given the key disclosure at the right time (some of which they were eventually given after the judicial review was started).

**The Defendant's defence**

31. In the Grounds for Contesting the claim, dated June 2023, the Defendant asserted that the claim was unarguable. The Defendant asserted that Arts. 2/3 did not require the Defendant to provide full disclosure to the Claimants during the investigation. Such



would be contrary to the Defendant's established practice. It was accepted that such an investigation was the State's primary means of discharging any of its obligations under Arts. 2/3 in serious injury cases but Parliament did not require the Defendant to provide full disclosure. The Claimants were kept up to date and informed of progress about the instruction of experts and other matters including on 16.7.2021 and 13.5.2022. That was sufficient. Even if the Claimants had made the theoretical submissions set out in the Statement of Grounds they would not have altered the reasonable actions already taken in the investigation. As to the draft report, the Defendant asserted that there was no requirement to disclose it to the Claimants, in contrast with the requirement to disclose it to the Police. As to public scrutiny, the Defendant asserted that it was not arguable that Arts. 2/3 required the Defendant to publish the final report. The one page summary was sufficient. As to the adequacy of the investigation, the Defendant asserted that the Claimants were merely raising differences of opinion. As to the pre-event Intel the Defendant set out, in summary, the Police information about FD having "Glocks" (which may be guns), keeping a gun in his car, making 2 separate threats to kill, having an axe and being recalled to prison for alleged breach of licence conditions. As to the assertion that the Defendant failed to take into account evidence which undermined Officer TP7's justification for using potentially lethal force, the Defendant asserted that any such failure did not make the report deficient under Arts. 2/3. The Defendant asserted that their failure to interview the AFOs was not a breach of their duty to carry out an adequate investigation. They took written accounts and asked written follow up questions. As to the delay in getting to hospital, the Defendant accepted that the only issue investigated was the delay in the arrival of the ambulance. In conclusion the Defendant asserted that: "*The IOPC conducted a thorough, detailed, independent investigation*".

### **The Defendant's U turn**

32. Permission was granted for the claim to go forwards by David Lock KC sitting as a deputy High Court Judge on 8.8.2023. Two months before the hearing of the claim, on 6 October 2023, the Defendant substantially changed its defence. The Defendant agreed to the quashing of the Decisions and of its whole investigation report. The identification of the detail of the admissions is made more difficult for this Court because there is no separate document with numbered Grounds of JR in the bundles provided to the Court. The Grounds are scattered amongst submissions in the Amended Statement of Facts and Grounds [ASFG].

### **Inadequate tactical analysis**

33. The Defendant no longer disputes the Claimants' claim with respect to some, but not all, of the Grounds asserting inadequate analysis of tactical decisions made on the basis of incorrect information. The Defendant admitted ASFG paras. 69(a)(i) and (iii), (b), (c) and (d) namely:
- (1) KD33 was unaware of markers on the Police CAD 63-6 in relation to ailment, self-harm and drugs.

- (2) One Police officer at the scene said he/she was told that FD had been seen with a gun that day, which was wrong.
- (3) No tactical options were discussed when FD fled into the house notwithstanding that this was likely on earlier information despite advice that reassessment would be needed if FD was sighted near such an address.
- (4) No ambulance was put on standby despite a firearms incident being redeclared.

**Inadequate analysis of the lawful justification for force**

34. The Defendant no longer contested some of the assertions of inadequacy in its analysis of matters relevant to the lawfulness of Officer TP7's decision to use potentially lethal force on FD. The Defendant admitted ASFG paras. 70(c)-(f). So, the Defendant does not contest the assertion that the Defendant failed adequately to examine and analyse:
- (1) The BWV footage which the Claimants assert shows that it would have been clear to TP7 and GW5 that FD was unarmed, he had nothing in his hands and he was not concealing anything under his tight fitting clothing.
  - (2) The BWV footage which the Claimants assert shows that FD was trying to escape and did not pose an imminent threat.
  - (3) The BWV footage which the Claimants assert shows that FD was not using physical force against the officers and that TP7 was not telling the truth when he so asserted.

**Guns and axes- the justification for lethal force**

35. However, the Defendant maintains its opposition to the remainder of the grounds of the claim. Thus, the contested assertions by the Claimants in relation to the investigation which were remaining were as follows:
- (1) ASFG para. 69(a)(ii), that the Defendant failed to explore or recognise a flaw in the planning and control of the operation because they wrongly considered that intelligence from 4.4.2021 or 29.4.2021 was newly from 8.5.2021 in relation to whether FD had a gun on him on 10.5.2021.
  - (2) ASFG para. 69(e), that the Defendant failed to explore or recognise a flaw in the planning and control of the operation because the Defendant failed for 22 minutes to pass critical information to the ambulance service about the re-declaration of a firearms incident.
  - (3) ASFG para. 70(a), that the Defendant failed to examine and analyse the historical date of the intelligence about FD's firearm possession, it being asserted that it would be less likely he would have had a gun on 10.5.2021.
  - (4) ASFG para. 70(b), that the Defendant failed to conclude that there was no proper information for the Police to conclude FD actually had a firearm on 10.5.2021.

**Disclosure, interviewing TP7 and the draft report**

36. The Defendant also maintained its defence in relation to non-disclosure of documents and evidence during the investigation, the decision not to interview witnesses and non-disclosure of the draft report to the Claimants.

**Art. 3 applies, Art. 2 denied**

37. At the hearing of the claim the Defendant admitted that Art. 3 of the ECHR applied to its investigation but denied that Art. 2 applied.

**The applicable Law and Procedure**

**The Human Rights Act 1998 [HRA98]**

38. The HRA 1988 sets out the following:

**“1. The Convention Rights.**

(1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

...

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

...

**Declarations of incompatibility; Human rights; Public authorities**

6. Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

**Schedule 1 The Articles**

**Right to life**

**Article 2**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is **no more than absolutely necessary:**

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;**
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### **Prohibition of torture**

#### **Article 3**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

### **Keeping the complainant informed**

39. S.20 of the PRA2002 requires the Defendant to “*provide the complainant with all such information as will keep him properly informed, whilst the investigation is being carried out and ...*” other matters. The matters of which the complainant must be kept properly informed are: (a) the progress of the handling of the complaint; (b) the outcome of the handling of the complaint; and (c) any right to apply for a review conferred on the complainant by paragraph 6A or 25 of Schedule 3 (as the case may be); and (d) such other matters as may be specified in regulations made by the Secretary of State. S.21 applies similar duties towards family members.
40. Reg. 33 of The Police (Complaints and Misconduct) Regulations 2020 [PR2020] states:

#### **“33. Matters of which the complainant and interested person must be kept properly informed**

(1) Paragraph (2) specifies matters of which the complainant and interested person must be kept properly informed, in accordance with sections 20(4)(d) and 21(9)(c) of the 2002 Act (duties to keep the complainant informed and provide information for interested persons)

(2) The matters are—

(a) in the case of the complainant, in relation to any right to apply for a review conferred on the complainant by paragraph 6A or 25 of Schedule 3 (reviews)—

- (i) the identity of the relevant review body;
- (ii) where the appropriate authority has determined that the Director General is the relevant review body, the paragraph of regulation 32 (relevant review body) relied upon in making that determination;
- (iii) where the appropriate authority has determined that the Director General is not the relevant review body, the fact that there is no right to apply to the Director General for a review;

- (iv) the time limit for applying for a review, and (v) the effect of regulation 29(5) (applications for a review: requirements);
  - (b) the progress of any—
    - (i) criminal proceedings;
    - (ii) disciplinary proceedings;
    - (iii) performance proceedings, or
    - (iv) reflective practice review process, brought in relation to, or arising from, any matter which was the subject of the complaint, recordable conduct matter or DSI matter;
  - (c) the outcome of any such proceedings or process;
  - (d) where an appeal is brought against the outcome of any such proceedings, the fact and outcome of the appeal.”
  
- 41. The duty to inform is not absolute. It is qualified by S.20 subsection (6) as follows:
  - “(6) The Secretary of State shall not by regulations provide for any exceptions from the duties imposed by this section except so far as he considers it necessary to do so for the purpose of—
    - (a) preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings;
    - (b) preventing the disclosure of information in any circumstances in which it has been determined in accordance with the regulations that its non-disclosure—
      - (i) is in the interests of national security;
      - (ii) is for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders;
      - (iii) is required on proportionality grounds; or
      - (iv) is otherwise necessary in the public interest.
  - (7) The non-disclosure of information is required on proportionality grounds if its disclosure would cause, directly or indirectly, an adverse effect which would be disproportionate to the benefits arising from its disclosure.
  - (8) Regulations under this section may include provision framed by reference to the opinion of, or a determination by, the Director General or any local policing body or chief officer.”
  
- 42. Reg. 35 of the PR2020 provides the exceptions which require secrecy from the complainants for some of the contents of the investigation or draft of final report and states that:

**“35.— Exceptions to duties to keep the complainant and interested person informed**

(1) In accordance with sections 20(5) and 21(10) of the 2002 Act (duties to keep the complainant informed and provide information for interested persons), paragraph (2) specifies the circumstances in which the duties imposed on the Director General and appropriate authority by those sections do not apply.

(2) The circumstances are where in the opinion of the Director General or appropriate authority (as the case may be) the non-disclosure of information is necessary for a purpose mentioned in paragraph (3).

(3) The purposes are—

(a) preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings;

(b) preventing the disclosure of information in any circumstances in which its non-disclosure—

(i) is in the interests of national security;

(ii) is for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders;

(iii) is required on proportionality grounds, or

(iv) is otherwise necessary in the public interest.

(4) The Director General or appropriate authority (as the case may be) may only conclude that the non-disclosure of information is necessary under paragraph (2) if satisfied that—

(a) there is a real risk of the disclosure of that information causing an adverse effect, and

(b) that adverse effect would be significant.

(5) The Director General or appropriate authority (as the case may be) must consider whether the non-disclosure of information is justified under paragraph (2) in circumstances where—

(a) that information is relevant to, or may be used in, any actual or prospective disciplinary proceedings or performance proceedings or appeal against the outcome of such proceedings;

(b) the disclosure of that information may lead to the contamination of the evidence of witnesses during such proceedings or appeal;

(c) the disclosure of that information might prejudice the welfare or safety of any third party;

(d) that information constitutes criminal intelligence.”

43. Schedule 3 of the PRA2002 sets out the procedures for handling complaints and conduct matters. Para. 19A permits the Defendant to operate a non-paper procedure, involving interviewing the person concerned, where there is an indication that a

member of a police force, or a special constable, to whose conduct the investigation relates, may have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings.

44. Para. 22 of Sched. 3 of the PRA2002 set out various duties to provide copies of the report to the persons concerned and various authorities. It does not state that the final report must be given to the complainant. Para. 23 requires the Defendant to notify the complainant and other relevant persons (the Police in this case) of decisions made and actions taken after the investigation.

### **The Guidance on the IOPC system**

45. The Guidance issued by the IOPC sticks pretty rigidly to the Statutory procedure. In relation to keeping the Claimants informed it states this:

#### **“Communicating with the complainant and other parties**

11.7 The appropriate authority, the local policing body (where they have taken on responsibility for updating complainants) or the IOPC (in directed and independent cases) must keep the complainant and/or interested persons properly informed about the progress and outcome of the handling of the complaint, recordable conduct matter or DSI matter. In doing so they must take into account the exceptions in paragraphs 11.16 – 11.20. They must ensure that they are in a position to respond to any questions or requests for information. This includes, where the local policing body has taken on responsibility for updating complainants, ensuring that appropriate processes are in place to ensure the local policing body has accurate and up-to-date information.

11.8 Forces and local policing bodies should ensure that communication is tailored to meet the needs of the individual, as far as possible. They should ask the complainant and/or interested person how they wish to be kept informed of the progress, and take all reasonable steps to achieve this. They must also make any reasonable adjustments required under the Equality Act 2010.

11.9 The updates that complainants and/or interested persons are provided with should be regular and meaningful. The first update must be provided promptly, in writing, and, at the latest, within four weeks of the start of the handling of the matter under Schedule 375. Subsequent updates must be provided at least every four weeks after that. A failure to give regular, timely, updates, or providing poor updates, is highly likely to damage the complainant’s and/or interested person’s trust in the process. Effective updates will also reduce the complainant feeling that it is necessary to chase for updates in order to feel properly informed.

11.10 Updates on the progress of handling should include, for example, information about the stage reached, what has been done, what remains

to be done and, where applicable, **a summary of any significant evidence obtained.** Updates should also include the likely timescale for completing the investigation or other handling and any revisions to this. If there are any revisions to timescales, the reason for this should be given.

11.11 There may be occasions where there has been little progress on the handling of the complaint since the last update – for example, the complaint handler is waiting for information from an external party. In these circumstances, an update must still be provided. For example, the update should explain why there is a delay, and what steps have been taken to mitigate the effect of any delay.

11.12 Depending on the complainant’s and/or any interested person’s wishes, it may be appropriate to provide updates both in writing and by another method.

11.13 The appropriate authority must in any event decide whether it is appropriate to offer, or grant a request for, a meeting with a complainant and/or interested person in order to comply with its duties to keep them properly informed. As soon as practicable after any such meeting, the appropriate authority must send the complainant or interested person a written record of the meeting and explain how any concerns raised will be addressed.

11.14 The IOPC also expects any person who is complained about (if any), or to whose conduct the matter relates, to be provided with updates in a similar fashion, taking into account the exceptions at paragraphs 11.16 – 11.20.

11.15 Where an investigation is subject to special procedures, there are specific requirements regarding the provision of information to the person who is complained about, or to whose conduct the matter relates (see Chapter 13).

#### **Exceptions to the duty to provide information**

11.16 The duty to keep the complainant and interested persons informed does not apply in circumstances where non-disclosure is necessary:

- to prevent premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings
- in the interest of national security
- for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders
- on proportionality grounds, and/or
- otherwise in the public interest

11.17 The appropriate authority must consider whether the non-disclosure of information is justified under any of the above grounds where:



- that information is relevant to, or may be used in, any actual or prospective disciplinary proceedings (or appeal against the outcome of such proceedings)
- the disclosure of that information may lead to the contamination of the evidence of witnesses during such proceedings (or appeal)
- the disclosure of that information may prejudice the welfare or safety of any third party, and/or
- that information constitutes criminal intelligence

11.18 Information must not be withheld on one of these grounds unless the appropriate authority concludes that there is a real risk of the disclosure of the information causing a significant adverse effect. In considering whether provision of information may have a significant adverse effect, it is necessary to bear in mind that the risk may not be explicit on the face of one document, but may be implicit when several documents are taken together. For example, an informant may not be named explicitly, but it may be possible to identify them from the context when several documents are considered together.

**11.19 Potential harm can sometimes be avoided or minimised by redacting harmful or personal material from the document or information requested. What needs to be removed will depend on what information is requested and what harm may arise from its disclosure. Handlers should consider what information can reasonably and proportionately be provided to the complainant or interested person without breaching any of the exemptions above.**

11.20 There are also specific exceptions regarding the provision of information during the handling of a matter:

- to the person who is complained about, or to whose conduct the matter relates, as set out at the appropriate points in this guidance
  - in a directed investigation, where that information is of a certain nature, under Section 21A of the Police Reform Act 2002 (see glossary)
- Where relevant to these exceptions, a requirement to consider the risk of prejudice to any investigation includes the risk of prejudice to any proceedings which may arise from that investigation.

#### **Keeping an audit trail**

11.21 The person handling a matter must be able to demonstrate what has been done, including what decisions have been made and why. This includes where a decision has been made not to do something. They should be able to demonstrate that they took steps to understand the matter and the views of any complainant or interested person where appropriate.

11.22 Any documents or evidence seen or created should be collated and preserved. The IOPC expects this audit trail to be available in relation to every matter, regardless of the complexity. Such information

will assist if the handling of a complaint is subject to a review, and must be provided to the relevant review body.” (My emboldening).

46. It is inherent in this Guidance that some documentation is going to be provided to the complainant, otherwise redaction would not be needed. There is no mention of the HRA1998 or the ECHR in the relevant sections of the Guidance provided to this Court.

### **The case law**

#### **Art. 2 engagement**

47. In *McKerr v United Kingdom* [2002] 34 E.H.R.R. 20, the European Court of Human Rights ruled that:

“110 The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims?”

The Court also set out the general principles between paras. 110 and 115. I shall recite the more recent guidance given in cases below.

48. In *Makaratzis v Greece* [2005] 41 EHRR 49, the Grand Chamber of the ECHR was deciding an issue over the applicability of Art 2. The Greek police tried to stop M after he had driven through a red traffic light in Athens. He accelerated, was pursued by several police officers in cars and his car collided with several other vehicles, went through five roadblocks, then the police started firing guns at M’s car. He alleged that they had fired at the cab where he sat, the Government maintained that they had fired at the tyres. Eventually, M stopped his car at a petrol station but locked the doors and refused to get out. The police officers continued firing. M alleged that they had fired at him, the Government claimed that they had fired into the air. Eventually, M was arrested and taken to hospital. He sustained various injuries including being shot in the foot and buttock. Three bullets passed through the rear windscreen and hit the front windscreen. The police were acquitted in the criminal trial but some of the officers were never identified and never handed in their guns. The Grand Chamber held as follows:

**“2. Applicability of Article 2 of the Convention**

49. In the present case the force used against the applicant was not in the event lethal. This, however, does not exclude in principle an examination of the applicant’s complaints under Art. 2, the text of which, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. In fact, the Court has already examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.

50 In this connection it may be observed, on the one hand, that the Court has already recognised that there may be a positive obligation on the state under the first sentence of Art. 2(1) to protect the life of the individual from third parties or from the risk of life-endangering illness. See *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245 at [115]–[122]; *Yas, a v Turkey*: (1999) 28 E.H.R.R. 408 at [92]–[108]; and *LCB v United Kingdom*: (1999) 27 E.H.R.R. 212 at [36]–[41].

51 **On the other hand, the case law establishes that it is only in exceptional circumstances that physical ill-treatment by state officials which does not result in death may disclose a violation of Art. 2 of the Convention.** It is correct that in the proceedings brought under the Convention the criminal responsibility of those concerned in the use of the impugned force is not in issue. Nonetheless, **the degree and type of force used and the intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the state agents’ actions in inflicting injury short of death are such as to bring the facts within the scope of the safeguard afforded by Art. 2 of the Convention, having regard to the object and purpose pursued by that Article.** In almost all cases where a person is assaulted or ill-treated by the police or soldiers, their complaints will rather fall to be examined under Art. 3 of the Convention.

52 **What the Court must therefore determine in the present case, where state officials were implicated in the applicant’s wounding, is whether the force used against the applicant was potentially lethal and what kind of impact the conduct of the officials concerned had not only on his physical integrity but also on the interest which the right to life is intended to protect.**

53 It is common ground that the applicant was chased by a large number of police officers who made repeated use of revolvers, pistols and sub-semi-automatic carbines. It is clear from the evidence adduced before the Court that the police used their weapons in order to immobilise the applicant’s car and effect his arrest, this being one of the instances contemplated by the second paragraph of Art. 2 when the resort to

lethal, or potentially lethal, force may be legitimate. As far as the ill-treatment proscribed by Art. 3 is concerned, at no time could there be inferred from the police officers' conduct an intention to inflict pain, suffering, humiliation or debasement on him. In particular, on the material before it the Court cannot find that the applicant's allegation as to the shooting of his foot after his removal from his car has been substantiated.

...

58 As the text of Art. 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Art. 2 does not grant a *carte blanche*. Unregulated and arbitrary action by state officials is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force,<sup>23</sup> and even against avoidable accident." (My **emboldening**).

49. The Grand Chamber gave guidance on the necessary investigation under Art. 2 as follows:

**"4. As to the alleged inadequacy of the investigation**

73. The obligation to protect the right to life under Art. 2 of the Convention, read in conjunction with the state's general duty under Art.1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of Force, See *Çakici v Turkey*: (2001) 31 E.H.R.R. 5 at [86]. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility See *Anguelova v Bulgaria*: (2004) 38 E.H.R.R. 31 at [137]. Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of state officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial. The same reasoning applies in the case under consideration, where the Court has found that the force used by the police against the applicant endangered his life.

74 The investigation must be capable, first, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye witness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness.”

In the event the Grand Chamber declared that Art. 2 applied and that the criminal investigation breached the procedural requirements of Art. 2.

### Art. 3

50. In *Bouyid v Belgium* [2016] 62 EHRR 32 (GC), the first and second applicants were brothers. B1 refused to produce his identity card to a police officer from the Saint-Josse-ten-Noode police force. He was taken to the police station where the officer slapped him in the face. A doctor confirmed bruising to the left cheek. B2 (the brother of B1) was also slapped by an officer from the same police force, during a later interview. The officer then forced him to sign a statement. B2 produced a medical certificate of the same date confirming that he had bruising. In relation to the engagement of Art. 3 the Grand Chamber ruled as follows:

#### “(ii) Classification of the treatment inflicted on the applicants

86 Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art. 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>34</sup> Further factors include the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it,<sup>35</sup> although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Art. 3.<sup>36</sup> Regard must also be had to the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions.<sup>37</sup>

87 Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall

within the prohibition set forth in Art. 3.<sup>38</sup> It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.<sup>39</sup>

88 Furthermore, in view of the facts of the case, the Court considers it particularly important to point out that, in respect of a person who is deprived of his liberty, or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Art. 3.<sup>40</sup>

89 The word “dignity” appears in many international and regional texts and instruments.<sup>41</sup> Although the Convention does not mention that concept—which nevertheless appears in the Preamble to Protocol No.13 to the Convention, concerning the abolition of the death penalty in all circumstances—the Court has emphasised that respect for human dignity forms part of the very essence of the Convention,<sup>42</sup> alongside human freedom.<sup>43</sup> 90 Moreover, there is a particularly strong link between the concepts of “degrading” treatment or punishment within the meaning of Art. 3 of the Convention and respect for “dignity”. In 1973 the European Commission of Human Rights stressed that in the context of Art. 3 of the Convention the expression “degrading treatment” showed that the general purpose of that provision was to prevent particularly serious interferences with human dignity.<sup>44</sup> The Court, for its part, made its first explicit reference to this concept in the *Tyrer* judgment,<sup>45</sup> concerning not “degrading treatment” but “degrading punishment”. In finding that the punishment in question was degrading within the meaning of Art. 3 of the Convention, the Court had regard to the fact that “although the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Art. 3 to protect, namely a person’s dignity and physical integrity”.<sup>46</sup> Many subsequent judgments have highlighted the close link between the concepts of “degrading treatment” and respect for “dignity”.<sup>47</sup> (The numbered footnotes are in Appendix 1 below).

...

100 ... where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person’s conduct diminishes human dignity and is in principle an infringement of the right set forth in Art. 3 of the Convention.”

51. The Grand Chamber then dealt with the procedural aspects which flow from the engagement of Art. 3 and gave general guidance at paras. 114-123:

## **“2. Procedural aspect of the complaint**

### *(a) General principles*

114 The Court refers to the general principles set out inter alia in *El-Masri* [2013] 57 E.H.R.R. 25 at [182]–[185], and *Mocanu* [2015] 60 E.H.R.R. 19 at [316]–[326].

115 Those principles indicate that the general prohibition of torture and inhuman or degrading treatment or punishment by agents of the state in particular would be ineffective in practice if no procedure existed for the investigation of allegations of ill-treatment of persons held by them.

116 Thus, having regard to the general duty on the state under art.1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, the provisions of Art. 3 require by implication that there should be some form of effective official investigation where an individual makes a credible assertion that he has suffered treatment infringing Art. 3 at the hands of, inter alia, the police or other similar authorities.

117 The essential purpose of such an investigation is to secure the effective implementation of the domestic laws prohibiting torture and inhuman or degrading treatment or punishment in cases involving state agents or bodies, and to ensure their accountability for ill-treatment occurring under their responsibility.

118 Generally speaking, for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence.

119 Whatever mode is employed, the authorities must act of their own motion. In addition, in order to be effective the investigation must be capable of leading to the identification and punishment of those responsible. It should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the state agents who directly used force but also all the surrounding circumstances.

120 Although this is not an obligation of results to be achieved but of means to be employed, any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the required standard of effectiveness.

121 A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public

confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

122 The victim should be able to participate effectively in the investigation.

123 Lastly, the investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation.”

52. In *R (Wiggins) v HM Assistant Coroner* [2015] EWHC 2841 (Admin), guidance was given to the effect that the question of whether the investigation has complied with Article 2, in relation to the participation of the family and other matters, is for the judgment of this Court giving due weight to the view of the Defendant. This was a suicide in prison case. The Divisional Court was considering a Coroner’s Court proceedings, the duty to investigate reasonably expeditiously, to permit sufficient public scrutiny and to permit the family to play an “effective role” (para. 60). Ouseley J ruled as follows:

“64. Whether or not the effective participation of the next of kin required legal representation at the inquest, and the state to pay for it, depended on the circumstances of the case; the complexity of the evidence would be a significant factor. ...

65. ... It was also agreed that the question whether the inquest complied with Article 2, both in relation to the participation of the family and in its scope, is for the judgment of this Court, and not one simply for the reasonable assessment of the coroner; *R (Goodson) v Bedfordshire and Luton Coroner* [2004] EWHC 2931 (Admin), [2006] 1WLR 432, Richards J. An appropriate degree of respect, however, had to be shown to the judgment of the Coroner. In my judgment, that is the right approach to the question of whether the Coroner should have called further witnesses.”

### **The procedural requirements of Art. 2**

53. The procedural requirements vary according to the context in which the procedural duty arises and depend on the circumstances of the particular case, see *Da Silva v United Kingdom* [2016] 63 EHRR 12 (GC), at para. 234. This was a lethal force case in which the MoP was shot dead by police officers. The IPCC (the IOPC’s predecessor) found failings but no cover up. The CPS decided not to prosecute any officers but did prosecute the Office of the Police Commissioner. The Coroner found the police officers honestly believed that the MoP was a terrorist (he was not). The European Court of Human Rights ruled as follows (with numbered footnotes):

“230 A general legal prohibition of arbitrary killing by the agents of the state would be ineffective, in practice, if there existed no procedure for



reviewing the lawfulness of the use of lethal force by state authorities. The obligation to protect the right to life under this provision, read in conjunction with the state's general duty under art.1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state. The state must therefore ensure, by all means at its disposal, an adequate response—judicial or otherwise—so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished. 231 The state's obligation to carry out an effective investigation has in the Court's case-law been considered as an obligation inherent in Art. 2, which requires, inter alia, that the right to life be "protected by law".

...

233 In order to be "effective" as this expression is to be understood in the context of Art. 2 of the Convention, an investigation must firstly be adequate.<sup>53</sup> This means that it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and—if appropriate—punishing those responsible.<sup>54</sup> This is not an obligation of result, but of means.<sup>55</sup> The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death.<sup>56</sup> Moreover, where there has been a use of force by state agents, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances.<sup>57</sup> Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.<sup>58</sup>

234 In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.<sup>59</sup> Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. The nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work.<sup>60</sup> Where a suspicious death has been inflicted at the hands of a state agent, particularly stringent scrutiny must be

applied by the relevant domestic authorities to the ensuing investigation.<sup>61</sup>

235 In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case.<sup>62</sup>

236 However, disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Art. 2. The requisite access of the public or the victim's relatives may therefore be provided for in other stages of the procedure.<sup>63</sup> Moreover, Art. 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.<sup>64</sup>"

(The numbered footnotes are in Appendix 2 below).

54. In *X v Bulgaria* 50 BHRC 344, 2 Feb 2021 (GC), a sexual abuse case with various State investigations carried out into allegations made about an orphanage, the applicants asserted the investigations were inadequate and in breach of their Art. 3 rights. The Grand Chamber ruled that there was a positive obligation on the State: (1) to put in place an appropriate legislative and regulatory framework; (2) to take operational protective measures and (3); a procedural obligation to carry out an effective investigation. On the scope of the procedural requirement the Chamber ruled follows, at paras. 184 -190:

**“(c) Procedural obligation to carry out an effective investigation**

184. Furthermore, where an individual claims on arguable grounds to have suffered acts contrary to art 3, that article requires the national authorities to conduct an effective official investigation to establish the facts of the case and identify and, if appropriate, punish those responsible. Such an obligation cannot be considered to be limited solely to cases of ill-treatment by State agents (see *SZ v Bulgaria*, cited above, para 44, and *BV v Belgium* (App no 61030/08) (judgment, 2 May 2017), para 56).

185. In order to be effective, the investigation must be sufficiently thorough. The authorities must take reasonable measures available to them to obtain evidence relating to the offence in question (see *SZ v Bulgaria*, cited above, para 45). They must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation (see *Bouyid v Belgium* (App no 23380/09) (2015) 62 EHRR 1045, [2015] ECHR 23380/09, para 123, and *BV v Belgium*, cited above, para 60). Any deficiency in the investigation which undermines its ability to establish the facts or

the identity of the persons responsible will risk falling foul of this standard (see *Bouyid*, cited above, para 120, and *Bati v Turkey* (App nos 33097/96 and 57834/00) (2004) 42 EHRR 736, para 134).

186. However, the obligation to conduct an effective investigation is an obligation not of result but of means. There is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see *A v Latvia* (App no 30808/11) (2016) 67 EHRR 975, para 149, and *MGC v Romania* (App no 61495/11) (judgment, 15 March 2016), para 58). Furthermore, the Court is not concerned with allegations of errors or isolated omissions in the investigation: it cannot replace the domestic authorities in the assessment of the facts of the case, nor can it decide on the alleged perpetrators' criminal responsibility (see *BV v Belgium*, cited above, para 61, and *M v Romania* (App no 29032/04) [2011] ECHR 29032/04, para 113). Likewise, it is not the Court's task to call into question the lines of inquiry pursued by the investigators or the findings of fact made by them, unless they manifestly fail to take into account relevant elements or are arbitrary (see *SZ v Bulgaria*, cited above, para 50, and *Y v Bulgaria* (App no 41990/18) (judgment, 20 February 2020), para 82). Nevertheless, a failure to pursue an obvious line of inquiry can decisively undermine the investigation's ability to establish the circumstances of the case and the identity of those responsible (see *MN v Bulgaria* (App no 3832/06), (judgment, 27 November 2012), para 48, and *Y v Bulgaria*, cited above, para 82).

187. Moreover, for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent ...

188. A requirement of promptness and reasonable expedition ...

189. Moreover, the victim should be able to participate effectively in the investigation (see *Bouyid*, cited above, para 122, and *BV v Belgium*, cited above, para 59). In addition, the investigation must be accessible to the victim to the extent necessary to safeguard his or her legitimate interests (see, in an art 2 context, *Giuliani v Italy* (App no 23458/02) (2011) 54 EHRR 278, [2011] ECHR 23458/02, para 303).

190. The investigation's conclusions, meanwhile, must be based on thorough, objective and impartial analysis of all relevant elements (see *A v Croatia*, cited above, para 108). Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see, *mutatis mutandis*, *Armani Da Silva v UK* (App no 5878/08) (2016) 40 BHRC 159, (2016) 63 EHRR 589, para 234)."

55. When considering the scope and extent of the procedural duty I take into account the following cases. In *Tershana v Albania* [2020] (48756/14) 4 August 2020, the Art. 2 procedural duty was triggered by an acid attack in which the applicant suffered life-endangering injuries. The State was not responsible. The criminal investigation was much delayed. The Court held that Art. 2 applied and “the investigation must be accessible to the victim’s family to the extent necessary to safeguard their legitimate interests”.

**“2. The Court’s assessment**

**(a) Applicability of Article 2**

131. With regard to the applicability of Article 2 in the present case, the Court notes that the applicant alleged that her injuries had been inflicted by an individual and not a State agent. The Court observes, however, that the absence of any direct State responsibility for the death of a person does not exclude the application of Article 2 of the Convention (see, for example, *Yotova v. Bulgaria*, no. 43606/04, § 68, 23 October 2012).

132. The Court further notes that the protection of this provision of the Convention may not only be relied upon in the event of the death of the victim of violent acts. Article 2 also comes into play in situations where the person concerned was the victim of an activity or conduct, whether public or private, which by its nature put his or her life at real and imminent risk and he or she suffered injuries that appeared to be life-threatening when they occurred, even though the person ultimately survived (see, among other authorities ...)”

...

“161 ... Moreover, despite the applicant’s repeated enquiries about the progress of the investigation, she was not given any information or documents in response. She could not therefore challenge any investigative actions (or omissions) or request the authorities to take other measures (see *Pihoni*, cited above, § 95). Nor could she bring a claim for damages in the absence of an identified perpetrator (see paragraph 138 above).

162. Accordingly, the criminal investigation in question, which has been stayed since 2010 by the prosecutor, cannot be described as an effective response by the authorities to the acid attack. There has thus been a violation of Article 2 of the Convention as regards the State’s procedural obligation.”

This ruling indicates firstly that, following *Makaratzis*, Art. 2 may apply in near fatal cases as well as fatal cases and secondly, that where it applies the victim should be given sufficient information or documents to enable her to effectively challenge investigative actions or omissions, or to effectively request the authorities take certain investigative measures.

56. In *Savitskyy v Ukraine* [2012] (38773/05) 26 July 2012, an allegation was made of intentional, non-fatal force by police officers against S. There was a breach of the Article 3 procedural duty in part because there was no code or procedure setting out how a victim may access the case file during the early stages of the proceedings. This meant the applicant did not have appropriate access to the case file, see para. 114.
57. The most recent Supreme Court guidance on the procedural obligations imposed when Art. 2 is engaged is *In Re McQuillan* [2021] UKSC 55. The relevant part of the judgment was provided by Lord Hodge at para. 109:

*“7. The obligation to investigate under articles 2 and 3 of the Convention*

109 The jurisprudence of the Strasbourg court which underpins the obligation on the state to investigate a death, or allegation of torture or inhuman and degrading treatment under articles 2 and 3 of the Convention is well established. (In this judgment, when convenient to do so, we will refer to this investigative obligation as “the article 2/3 investigative obligation”):

(i) Articles 2 and 3 of the Convention enshrine two of the basic values of democratic societies making up the Council of Europe. Article 2, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions of the Convention: *Anguelova v Bulgaria* (2002) 38 EHRR 31, para 109; *Jordan v United Kingdom* 37 EHRR 2, para 102. Article 3, which provides that “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”, is also one of the core provisions of the Convention from which no derogation is permitted even in time of war or other public emergency.

(ii) As the state has a general duty under article 1 of the Convention to secure to everyone the rights and freedoms defined in the Convention, the combination of articles 1 and 2 requires by implication that there be some form of official investigation when individuals have been killed by the use of force: *McCann v United Kingdom* (1995) 21 EHRR 97, para 161; *Nachova v Bulgaria* (2005) 42 EHRR 43, para 110 (Grand Chamber); *Tunc v Turkey* [2016] Inquest LR 1, para 169 (Grand Chamber). The essential purpose of such an investigation is two-fold. It is to secure the effective implementation of the domestic laws that protect the right to life; and, in cases involving state agents or bodies, it is to ensure their accountability for deaths occurring under their responsibility: *Nachova* (above, para 110; *Jordan* (above), para 105.

(iii) A similar duty of investigation arises under article 3 of the Convention where there is a reasonable suspicion that a person has been subjected to torture or inhuman or degrading treatment: *El-Masri v*

*Former Yugoslav Republic of Macedonia* (2012) 57 EHRR 25, para 182; *Al Nashiri v Romania* (2018) 68 EHRR 3, para 638; *R (Mousa) v Secretary of State for Defence (No 2)* [2013] HRLR 32.

(iv) An adequate and prompt investigation is essential to maintain public confidence in the adherence of the state authorities to the rule of law and in preventing any appearance of complicity or collusion in or tolerance of unlawful acts: *McKerr v United Kingdom* (2001) 34 EHRR 20, para 114; *Brecknell* 46 EHRR 42, para 65; *Al Nashiri v Romania* (above), para 641. Victims, their families and the general public have a right to the truth, which necessitates public scrutiny and accountability in practice: *El-Masri v Former Yugoslav Republic of Macedonia* (above), para 191; *Al-Nashiri v Romania* (above), para 641. The authorities must act of their own motion, once the matter is brought to their attention: *McKerr v United Kingdom* (above), para 111.

(v) There must be a sufficient element of public scrutiny of the investigation or its results in order to secure accountability in practice. The degree of public scrutiny that is required will vary from case to case but the next of kin or victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests: *McKerr v United Kingdom* (above), para 115; *Anguelova v Bulgaria* (above), para 140; *Jordan* (above), para 109.

(vi) There is an obligation to ensure that the investigation is effective; this is an obligation of means rather than result. The investigation must be effective in the sense that it is capable of leading to a determination of whether the force used by an agent of the state was or was not justified in the circumstances and to the identification and punishment of those responsible: *Jordan* (above), para 107; *Nachova* (above), para 113; *Ramsahai v Netherlands* (2007) 46 EHRR 43, para 324. For the investigation to meet this criterion, the authorities must take whatever reasonable steps they can to secure the evidence and reach their conclusions on thorough, objective and impartial analysis of all relevant elements: *Giuliani and Gaggio v Italy* (2011) 54EHRR 10, paras 301—302.

(vii) Another aspect of an effective investigation, which is the focus of one of the central issues in these appeals, is that the persons responsible for carrying out the investigation must be independent of those implicated in the events. The Strasbourg court has emphasised, as we discuss more fully below, that this requires not only a lack of hierarchical or institutional connection but also practical independence. See *McKerr v United Kingdom* (above), para 112; *Jordan* (above), para 106; *Ramsahai* (above), para 325. In *Nachova* (above), para 112, the Grand Chamber stated: “For an investigation into alleged unlawful killing by state agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law

and in practice.” In support of that proposition the Grand Chamber cited *Gulec v Turkey* (1998) 28 EHRR 121, paras 81—82; *Oğur v Turkey* (1999) 31 EHRR 40, paras 91—92; and *Ergi v Turkey* (1998) 32 EHRR 18, paras 83—84.”

### **Applying the law to the facts**

#### **Is this all Academic?**

58. The Defendant submitted that the claim was academic after the admissions which it made in October 2023. I have considered the relevant factors set out by Lieven J in *R (AM) v Home Secretary* [2022] EWHC 2591, at paras. 36-44. I do not consider that this claim is academic. There are issues remaining over the applicability of Art. 2, the future scope of the Defendant’s procedural duties in relation to disclosure and effective participation of the Claimants in the future IOPC investigation of the events which involved the use of potentially lethal force and which have led to the most severe non-fatal injuries possible, short of death. There are issues over the total lack of guidance on the procedural requirements of Art. 2/3 investigations in the IOPC’s guidance document. There are issues over public scrutiny, for instance the Defendant refused to agree that the new final report should be published for public scrutiny. In my judgment those are sufficient to make this claim more than merely academic.

#### **Applicability of Art 2**

59. The Police obviously carry out a function of a public nature and a public service. The Defendant also carries out a function of a public nature and a public service and is funded by the State. The State set up, regulates and supervises the function of the Defendant. The investigation and identification of matters which may require discipline of the Police, or consideration of criminal proceedings, are matters of public interest and are intrinsically activities of the State. The Defendant operates under statutory powers. Thus, the functions of and decisions of the Defendant are amenable to judicial review.
60. In my judgment the forceful thrusting of the metal rifle’s or semi-automatic carbine’s muzzle, the full structure of which I cannot see on the BWV and is not properly described in the final report, but which is clearly small, round, metal and may have other metal bits sticking out of it, into the side of the head of FD, was use of “lethal force” within the definition set out in *Makaratzis*. The report of Inspector Flack makes it clear that AFOs are informed of the risk of serious injury to a MoP from such a manoeuvre to the head. This is a matter of common sense too. In this case the force used was such that FD’s skull was fractured and the gun metal penetrated into FD’s brain. The injury was as bad as it can get, short of death. Therefore, in my judgment, Art. 2 was engaged and applied to the State’s investigation carried out into the incident by the IOPC. The Defendant’s investigation had to comply with the procedural requirements flowing therefrom.

61. Other cases in which the Art. 2 procedural obligation was held to arise where the police used intentional near-fatal force, are *Petrov v Bulgaria* [2010] (63106/00) 10 June 2010. In that case the police shot a drunk who refused to stand still when challenged. He was injured but survived. The European Court of Human Rights ruled at para. 39 as follows:

*“1. Whether Article 2 is applicable*

39. In the present case, the force used against the applicant was not in the event fatal. The Court must therefore determine whether the facts should be examined under Article 2 or rather under Article 3 of the Convention. In so doing, it must have regard to the degree and type of force used, as well as the intention or aim behind the use of that force. If the force was potentially deadly and the conduct of the officers concerned was such as to put the applicant's life at risk, then Article 2 is applicable (see *Makaratzis v. Greece* [GC], no. 50385/99, §§ 49-55, ECHR 2004-XI; *Tzekov v. Bulgaria*, no. 45500/99, § 40, 23 February 2006; and *Goncharuk v. Russia*, no. 58643/00, § 74, 4 October 2007).”

62. In *Khojuyan v Azerbaijan* [2021] (62161/14) 4 November 2021, K aged 77, was beaten up and shot by State agents having been arrested whilst acting as a guide to a group of saboteurs. The European Court of Human rights ruled as follows:

**“34 (d) Applicability of Article 2 of the Convention**

With regard to the applicability of Article 2 of the Convention, the Court reiterates that that provision also comes into play in situations where the person concerned was the victim of an activity or conduct, whether public or private, which by its nature put his or her life at real and imminent risk and he or she has suffered injuries that appear life-threatening as they occur, even though he or she ultimately survived ...”

63. The parties agree that Art. 3 applied. Thus, the investigation by the Defendant had to comply with the procedural obligations summarised above in *Bouyid*. But what does the engagement of Art. 2 add? I shall look now at the procedural requirements of Art. 2 in the circumstances of this case.

**The procedural requirements under Art. 2**

64. The relevant sections of the IOPC Guidance 2020 provided to the Court make no mention whatsoever of the HRA98 or the ECHR. No guidance is given on the procedural elements of the Art. 2/3 duties. This is not helpful to those carrying out an IOPC investigation who will need guidance on their procedural duties and gives the appearance that the IOPC deny being bound by the ECHR, which is potentially misleading to the public. That is precisely the defence the IOPC took when they pleaded that the claim was unarguable.



65. In my judgment, the investigation by the IOPC in this case needed a high level of procedural requirements under Art. 2 because of the following factors. Firstly, an investigation procedure which is capable of leading to further consideration of criminal and/or disciplinary punishment is “*vital*”, see *Jeronovics v Latvia* [2016] (44898/10) 5 July (GC) at paras. 105-106 (an Art. 3 case) and *Oneryildiz v Turkey* [2005] 41 EHRR 20 (GC) at para. 92 (an Art. 2 case). Secondly, the Police actions caused FD maximum severity injuries and took away all of his joy and amenities of life, so the investigation should permit more intense public and family scrutiny. Thirdly, securing accountability where a MoP is reduced to a very severely injured state by police action is instrumental in maintaining public confidence in the adherence of the State to the rule of law, see *Al-Nashiri v Poland* (2015) 60 EHRR 16, para. 497 (an Art. 3 case). Fourthly, in such cases a central purpose of the procedural obligation is to ensure the accountability of the State agents. Fifthly, the force was intentionally used not negligently applied so is taken more seriously. Sixthly, the information regarding the circumstances of his injury is almost wholly within the exclusive knowledge of the State authorities. Seventhly, the Defendant’s investigation and decisions were and are likely to be determinative of whether there would have been or will be accountability via criminal or disciplinary punishment and might or may impinge on the evidence which will affect civil liability. This means the Defendant’s investigation was and will be critical for the fulfilment of the central requirement of the procedural duties in Arts. 2/3 in this particular context. Eighthly, there will be no inquest and there are no other State-initiated mechanisms which will investigate this case. The Defendant’s report itself recognises that it forms part of the discharge of the State’s investigative duties at para. 9.
66. Having ruled that under the case law set out above by the European Court of Human Rights, recognised by the English and Welsh Courts, this investigation was one to which Art. 2 applied, despite the victim still being alive, I must now consider the Art. 2 procedural requirements. In the full context of this case, in my judgment, the relevant requirements are as follows:

#### **Own motion and Independence**

- (1) For an investigation to be effective, the IOPC, the institution and the persons responsible for carrying it out, must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence. Furthermore, the authorities must act of their own motion.

#### **Breadth**

- (2) The investigation should be broad enough to permit the IOPC (the investigating authority) to take into consideration not only the actions of the State agents (Police) who directly used force but also all the surrounding circumstances.

#### **Effective**

- (3) The national authorities (IOPC) must conduct an effective official investigation to establish the facts of the case and identify and, if appropriate, recommend consideration of criminal or disciplinary proceedings against those responsible.

### **Adequate**

- (4) The investigation must be adequate. This means that it must be capable of leading to the establishment of the facts and a determination of whether the force used was or was not justified in the circumstances.
- (5) The investigation must be thorough, which means that the IOPC must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation.
- (6) The IOPC must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, a complete and accurate record of the injuries suffered and an objective analysis of the clinical findings.
- (7) The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements.

### **Without Substantial Deficiencies**

- (8) Although this is not an obligation of results to be achieved but of means to be employed, any deficiency in the investigation which undermines its ability to establish the cause of the injuries or the identity of the persons responsible will risk falling foul of the required standard of effectiveness.
- (9) A failure to pursue an obvious line of inquiry can decisively undermine the investigation's ability to establish the circumstances of the case and the identity of those responsible.

### **Effective Participation**

- (10) The victim (and/or the family of the victim) should be able to participate effectively in the investigation, thus the investigation must be accessible to the victim to the extent necessary to safeguard their legitimate interests. In *Soare v Romania* (24329/02) (French) 22 February 2011, an Art. 2 case, the European Court held:

“165... In all cases, however, the victim's relatives must be involved in the procedure to the fullest extent necessary to protect their legitimate interests ...” (Translated from the French judgment).

### **Effective Participation**

67. The issues in this claim mainly concerns effective participation of the family of the mother of FD in the IOPC investigation. There is no doubt that the family must be kept informed of the progress and substance of investigation and of the nascent decisions which the IOPC intended to make for effective participation to be provided. But what is the level of detail of disclosure required to achieve participation which is effective? To decide on this, in my judgment, the Court looks at the following factors:

### **Legitimate interests**

- (1) The families' and FD's legitimate interests centre on their right to know how FD became seriously injured and by whom he was injured and in what

circumstances. In addition, they have potential civil litigation rights and legitimate rights to see justice done by way of criminal proceedings and disciplinary proceedings (if such are warranted).

**Exercising effective participation**

(2) To be able to exercise these legitimate interests, FD and his family needed and will need access to information about the nascent decisions and the evidence gathered in the IOPC investigation which is sufficiently detailed, accurate and full so as to be able to analyse the detail of the events and (a) make comments or submissions or (b) provide suggested questions which they think that the IOPC should follow up on or ask, about key substantive matters or about further lines of enquiry.

68. There is a balance to be struck here between full scale involvement, which is not required or necessary and will delay and may endanger the investigation, on the one hand, and the provision of mere updating information once a year, which is wholly inadequate. The Defendant took the latter course in this investigation and as a result, in my judgment, failed to fulfil the duties it carried under Art. 2 to provide effective participation.

69. In the written post hearing submissions, the Defendant submitted that the IOPC investigation was a preliminary investigation and so the following case law rules applied:

- (1) Automatic disclosure of the draft report was not required;
- (2) The Claimants were not entitled to have access to the material gathered by the IOPC but only to being informed about the gist of the findings and recommendations;
- (3) The provision of witness statements and the right to comment on them was not required.

The Defendant submitted that because the preliminary investigation may lead to further investigation and hearings, if there is a case to answer, the current system, as currently operated (by the provision of annual updates in this case) is convention compliant.

70. I reject those three general submissions. There is no benefit in trying to extract, from general statements made in previous cases, concrete rules against disclosure which bind all IOPC investigations. The Art. 2 (and Art. 3) procedural requirements are wholly case and circumstances specific. I note that, despite those general submissions, in the circumstances of this case, the Defendant accepted in its post hearing submissions, that the BWV should have been disclosed for the following reasons: 1. A para. 19 Sch 3 PRA2002 independent investigation of the complaint will take place. 2. The Art. 3 investigative duties apply. 3. There is reasonably good quality body worn video of the relevant use of force (the muzzle strike by TP7) and the pursuit preceding it. 4. There

are no non-police eyewitnesses to the relevant use of force. 5. The subject of the use of force is unable to provide any account as a result of its effects on him. 6. The body worn video is material but cannot be summarised. 7. Disclosure of the body worn video does not risk prejudicing any potential disciplinary or criminal proceedings.

71. The Claimants submitted that the Court should declare that:

“Article 2/3 requires that the family are able to effectively participate in the IOPC’s investigation, and this includes that the IOPC must make available to them such information and evidence as is necessary to enable them to make effective submissions about the significant actions and decisions in the investigation, subject to regulation 35 of the Police (Complaints and Misconduct) Regulations 2020.”

That is an accurate summary but lacks specificity in this claim. Alternative, more specific, submissions were also made by the Claimants. I will look at the circumstances of this case below and consider what was required under Art. 2.

**Mere updates and necessary disclosure of information**

72. There is a difference in substance between: (1) keeping the complainant informed (the PRA 2002 and the PR2020 both make it clear that is required), and (2) providing to the Claimants sufficient disclosure of the information and evidence collected by the IOPC or an accurate summary of the relevant parts thereof (if that is possible) and of the IOPC’s proposed decisions. The latter is not enshrined in the English Statutes governing the IOPC, but is it required to satisfy Art. 2 in this case to enable the effective participation requirement?

73. The legislation did not make specific provision in the IOPC investigations for the disclosure to the complainants of edited key witness statements, the BWV, edited police Intel or the draft report. The IOPC Guidance is vague on disclosure. In my judgment, subject to the provisions of para. 35 of the PR2020, to fulfil its obligations under Art. 2 the IOPC will need to provide FD and his family with the key substantive evidence in relation to the use of force against FD so that they can exercise effective participation in the investigation. The form of that disclosure is a matter for the IOPC. None of it was provided before the final report so that was a breach of the Defendant’s Art. 2 obligations. Instead, the Defendant met with the family twice. The first time was on 16.7.2021 and the next in 2022. In response to the first meeting the Claimants’ solicitors wrote on 11.8.2021 as follows:

“My clients and I met with Ms McDonald on 16 July. She told us that she has now watched the video footage and is confident that this captures all the force used. This apparently shows one officer striking Francis on the head with the muzzle of his weapon which is thought to have caused his head injury. The officer has sought, in his statement(s)

to justify his use of force. Ms McDonald told us that she has not seen anything that tells her that the force used wasn't justified. As a consequence she is not treating this as a possible misconduct or criminal matter.”

74. By failing to disclose the BWV to the Claimants and the detail of TP7's evidence on his Intel and the decision to make his muzzle thrust, the Claimants were rendered unable to participate effectively in the investigation. They could not raise relevant issues about TP7's use of force and knowledge of risk. Without being informed of the relevant parts of TP7's witness statements the Claimants could not comment on the discrepancies between those and the BWV or identify matters which affected their legitimate interests. I agree with Mr Basu's submission that there was no downside to disclosing the BWV in a careful way, during the investigation stage. If criminal proceedings or disciplinary proceedings were possibly to follow, the BWV was going to be central to those, but it was static evidence and would not be affected adversely by disclosure in the same way that a witness who was named might have been. The BWV was disclosed after the final report and after the Claimants' letter before action. Likewise, edited parts of the evidence of TP7 and GW5 and the medical reports and the report of Mr Flack were vital to the effective participation of the Claimants.
75. I have not seen the Intel evidence so cannot comment upon it, but the same factors apply in relation to disclosure of that (or an accurate but edited summary of it) to the Claimants.
76. The use of force analysis in the final report was mainly between paras. 259 and 272. Much was made in submissions of the IOPC's failure to consider whether TP7 had his finger on the trigger and the safety catch off as he thrust the rifle into FD's head, thereby giving rise to a risk of discharge during the thrust. This, in conjunction with the lack of analysis of whether a body blow, below the head, would more safely have achieved TP7's objectives and GW5's decision to thrust his semi-automatic carbine into FD's shoulder, not his head, are matters highlighting the inadequacy of the analysis. JM advised that *“from the BWV it is not possible to ascertain whether TP7 may have reasonably practicably been able to strike ... in another area of his body”*. Save for that and JM's summary that FD was non compliant with Police orders and that the use of muzzle strikes is permitted by training if the circumstances so require, there is no further analysis of reasonable force. This is particularly relevant in the light of TP7's admission that he *“did not have time to think about the medical implications”*, his decision was split second. The analysis did not consider whether TP7 should have thought for a second or two about the implications, as was set out earlier in the final report by JM as a required part of his training. The difference between the state of Intel knowledge of GW5 and TP7 was apparent. The former stated FD possibly had a gun. The latter stated he understood FD *“was in possession of a firearm”*. KD33 said he had reason from the Intel to believe his officers may need to protect themselves from a person who is in possession of or has immediate access to a firearm. G6 stated he had

received an update that evening that FD “*had been seen pulling a silver handgun out of his waistband whilst sitting in a car*”. The absence of proper analysis of these contradictions is another reason to question the adequacy of the analysis in relation to tactical knowledge and Intel and communication with the AFOs involved.

77. The summary of the report which was published contained 3 paragraphs and made no mention of the rifle muzzle blow to the head causing permanent brain damage and very severe disability or the fact that FD was unarmed. It does not comply with the requirement of public scrutiny under the procedural requirement of Art. 2 in my judgment.

### **Each Ground**

78. **Ground 1.** In my judgment ground 1 is made out. This ground was admitted by the Defendant in October 2023 on some of the asserted sub-grounds in any event. I consider that the investigation and final report engaged Art. 2. As a result, the investigation and report were subject to the procedural requirements flowing therefrom which I have set out above. In the event, despite a lot of hard work by the IOPC, the Defendant did not allow the Claimants effectively to participate in the process. The Defendant failed to provide the Claimants with disclosure (in a safe form and in compliance with Reg. 35 of the PR2020) of the BWV, the details of TP7’s evidence on Intel and his thinking and actions and other relevant and necessary evidence sufficient to enable effective participation by way of asking questions and raising issues for the Defendant to consider and explore. In my judgment the provision to the Claimants of the draft report or a first draft of the draft report, was necessary to permit the Claimants to participate in relation to the nascent decisions.
79. In addition, in my judgement, the investigation was evidentially inadequate due to a lack of face to face interviews with various officers including TP7 and GW5. The trigger for this procedure was probably satisfied in my judgment. The threshold is low.
80. Furthermore, the analysis in the report was inadequate on the key substantive issues of Intel and the proper application and communication thereof to AFOs and crucially, whether there was reasonable justification for the potentially lethal use of force by TP7.
81. Further, the required and necessary analysis of the post event ambulance arrival and departure delays was inadequate.
82. In my judgment the published summary of the investigation breached the Art. 2 reasonable public scrutiny obligation. It was scant and uninformative.
83. The admissions made by the Defendant are set out at para. 34 and 35 above. As to the outstanding issues at para. 36 above:

- (1) In the ASFG para. 69 (ii), the Claimants asserted that the Defendant failed to explore or recognise a flaw in the planning and control of the operation because they wrongly considered that intelligence from 4.4.2021 or 29.4.2021 was newly from 8.5.2021 in relation to whether FD had a gun on him on 10.5.2021.
- (2) ASFG para. 69(e), that the Defendant failed to explore or recognise a flaw in the planning and control of the operation because the Defendant failed for 22 minutes to pass critical information to the ambulance service about the re-declaration of a firearms incident.
- (3) ASFG para. 70(a), that the Defendant failed to examine and analyse the historical date of the intelligence about FD's firearm possession, thus it being asserted that it would be less likely he would have had one on 10.5.2021.
- (4) ASFG para. 70(b), that the Defendant failed to conclude that there was no proper information for the Police to conclude FD had a firearm on 10.5.2021.

In my judgment the issues (1)-(3) above should have been investigated. (4) is a suggested conclusion and that is wholly a matter for the judgment of the next investigating officer on the evidence gathered.

84. **Ground 2.** It is agreed that the common law grounds set out add nothing to the claim.

### **Conclusions**

85. In my judgment, the remaining issues in the claim are not academic and for the reasons given above, Art. 2 of the ECHR applied to the investigation and the report.
86. By consent the Court will declare that the Defendant's investigation and report were carried out in breach of the Claimants' rights under Art. 3, and in my judgment were carried out in breach of Art. 2 of the ECHR.
87. The Court will therefore quash (1) the decisions taken by the Defendant on 17.1.2023 and disclosed on 10.2.2023 to the Claimants, and (2) the Defendant's final report.
88. The decisions quashed are as follows:
- (1) That the final report did not indicate that a criminal offence may have been committed by a person, if any, to whose conduct the investigation related and that it would not refer the matter to the CPS in respect of a prosecution;
  - (2) That no person to whose conduct the investigation relates had a case to answer for misconduct or gross misconduct;
  - (3) That there will be no disciplinary proceedings against any of the officers; and
  - (4) not to uphold any of the First Claimant's complaints.
89. I note that the Defendant has agreed to re-open its investigation into the event and the issues arising from it. This will no doubt be carried out quickly. In those circumstances I will record the agreement to that effect in the order to be made.

90. The guidance issued by the IOPC in 2020 omits any reference to the Defendant's duties under Arts.2/3 of the ECHR. This omission should be resolved with some haste for the benefit of the IOPC investigators and the public who may be entitled to rely on such guidance.

The following Appendices are included in the Judgment.

## Appendix 1

### Numbered footnotes to *Bouyid* extract:

[Footnotes:

32. See *Cobzaru v Romania* (2008) 47 E.H.R.R. 10 at [65].
33. See *Denisenko and Bogdanchikov v Russia* (3811/02) 12 February 2009 at [83].
34. See, among other authorities, *Ireland* (1979–80) 2 E.H.R.R. 25 at [162]; *Jalloh* (2007) 44 E.H.R.R. 32 at [67]; *Gäfgen* (2011) 52 E.H.R.R. 1 at [88]; *El-Masri* (2013) 57 E.H.R.R. 25 at [196]; and *Svinarenko and Slyadnev* (32541/08 and 43441/08) 17 July 2014 at [114].
35. Compare, inter alia, *Aksoy v Turkey* (1997) 23 E.H.R.R. 553 at [64]; *Egmez v Cyprus* (2002) 34 E.H.R.R. 29 at [78]; and *Krastanov v Bulgaria* (2005) 41 E.H.R.R. 50 at [53]; see also, among other authorities, *Gäfgen* (2011) 52 E.H.R.R. 1 at [88]; and *El-Masri* (2013) 57 E.H.R.R. 25 at [196].
36. See, among other authorities, *V v United Kingdom* (2000) 30 E.H.R.R. 121 at [71]; and *Svinarenko and Slyadnev* (32541/08 and 43441/08) 17 July 2014 at [114].
37. Compare, for example, *Selmouni* (2000) 29 E.H.R.R. 403 at [104]; and *Egmez* (2002) 34 E.H.R.R. 29 at [78]; see also, among other authorities, *Gäfgen* (2011) 52 E.H.R.R. 1 at [88].
38. See, among other authorities, *Vasyukov v Russia* (2974/05) 5 April 2011 at [59]; *Gäfgen* (2011) 52 E.H.R.R. 1 at [89]; *Svinarenko and Slyadnev* (32541/08 and 43441/08) 17 July 2014 at [114]; and *Gafgen* (13255/07) 3 July 2014 at [192].
39. See, among other authorities, *Tyrer v United Kingdom* (1979–80) 2 E.H.R.R. 1 at [32]; and *MSS v Belgium* (2011) 53 E.H.R.R. 2 at [220].
40. See, among other authorities, *Ribitsch* (1996) 21 E.H.R.R. 573 at [38]; *Mete* (294/08) 4 October 2012 at [106]; and *El-Masri* (2013) 57 E.H.R.R. 25 at [207].
41. See [45]–[47] above.]

## Appendix 2



**Numbered footnotes to *DaSilva* extract.**

[Footnotes:

53. See *Ramsahai* (2008) 46 E.H.R.R. 43 at [324] and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [172].
54. See *Giuliani* (2012) 54 E.H.R.R. 10 at [301] and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [172].
55. See *Nachova v Bulgaria* (2006) 42 E.H.R.R. 43 at [160]; *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [186]; and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [173].
56. As regards autopsies, see, for example, *Salman v Turkey* (2002) 34 E.H.R.R. 17 at [106]; on the subject of witnesses, see, for example, *Tanrikulu v Turkey* (2000) 30 E.H.R.R. 950 at [109]; as regards forensic examinations, see, for example, *Gül v Turkey* (2002) 34 E.H.R.R. 28 at [89].
57. See, for example, *Kaya v Turkey* (1999) 28 E.H.R.R. 1 at [87].
58. See *Avşar v Turkey* (2003) 37 E.H.R.R. 53 at [393]–[395]; *Giuliani* (2012) 54 E.H.R.R. 10 at [301]; and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [174].
59. See *Kolevi v Bulgaria* (2014) 59 E.H.R.R. 23 at [201], and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [175].
60. See *Velcea and Mazăre v Romania* (64301/01) 1 December 2009 at [105], and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [175].
61. See *Enukidze and Girgvliani* (25091/07) 26 April 2011 at [277].
62. See *Jordan* (2003) 37 E.H.R.R. 2 at [109]; *Giuliani* (2012) 54 E.H.R.R. 10 at [303]; and *Mustafa Tunç and Fecire Tunç* (24014/05) 14 April 2015 at [179]; see also *Güleç* (1999) 28 E.H.R.R. 121 at [82], where the victim’s father was not informed of the decision not to prosecute, and *Oğur* (2001) 31 E.H.R.R. 40 at [92], where the family of the victim had no access to the investigation or the court documents].

END